

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**SCOTT AND SHERRI COMSTOCK,
d/b/a THE CHESHIRE CAT and THE
SPOTTED CROCODILE,
Plaintiffs,**

FILED: JULY 22, 2008

08CV4167

JUDGE KOCORAS

MAGISTRATE JUDGE SCHENKIER
TG

v.

**Case No. _____
JURY DEMAND**

**GANZ, INC. and GANZ USA, LLC,
Defendants.**

CLASS ACTION COMPLAINT

NOW COME Plaintiffs, SCOTT COMSTOCK AND SHERRI COMSTOCK
d/b/a THE CHESHIRE CAT and THE SPOTTED CROCODILE, through their attorneys,
GOLD & COULSON, a partnership of professional and limited liability corporations,
Phillips & Garcia, P.C., and Paul Hamel, and complain as follows with respect to
Defendants GANZ, INC. and GANZ USA, LLC:

INTRODUCTION

1. Plaintiffs, husband and wife, SCOTT COMSTOCK AND SHERRI COMSTOCK
("THE COMSTOCKS") d/b/a THE CHESHIRE CAT and THE SPOTTED
CROCODILE on behalf of all others similarly situated, bring this action under the
Sherman Act, the Clayton Act, and for breach of contract against Defendants GANZ,
INC. and GANZ USA, LLC (collectively referred to as "Ganz"). This action arises from
Ganz's tying conduct in requiring retailers like THE COMSTOCKS to purchase Ganz's
"core product" (the "tied" product) in order to purchase Ganz's incredibly popular
Webkinz plush toys (the "tying" product).

PARTIES

2. The COMSTOCKS are the sole proprietors of THE CHESHIRE CAT and THE SPOTTED CROCODILE, with their principal place of business in Grayslake, Illinois. In their two connected shops, they sell gifts, toys, jewelry, handbags, candles, bath products, and other various items and collectibles.

3. Defendant GANZ, INC. is a corporation organized and existing under the laws of Canada with its principal place of business at One Pearce Road, Woodbridge, Ontario, Canada. GANZ, INC. designs, produces, imports, and sells toys and gift items. GANZ, INC. formulates and oversees the marketing, distribution, and sales policies of Ganz products, including Webkinz.

4. Defendant GANZ USA, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business in Cheektowaga, New York. GANZ USA, LLC is a wholly-owned business unit of GANZ, INC.

5. Ganz transacts business in the Northern District of Illinois and throughout the nation.

JURISDICTION AND VENUE

6. THE COMSTOCKS bring this action to obtain injunctive relief and to recover treble damages and the costs of this suit, including reasonable attorneys' fees, against Ganz for injuries sustained by THE COMSTOCKS and the members of the Class as a result of violations of the Sherman Act, 15 U.S.C. § 1.

7. This Court has jurisdiction over the subject matter of this dispute under the provisions of Sections 1331, 1337, and 2201 of Title 28 of the United States Code, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

8. This Court has jurisdiction over this dispute pursuant to the Class Action Fairness Act, 28 U.S.C. § 1132(d), in that Plaintiffs and Defendants are citizens of different states and the amount in controversy exceeds \$5,000,000.00 exclusive of interests and costs, and the suit is brought as a class action.

9. The Court has jurisdiction over each of the Defendants by virtue of their nationwide contacts and business activities, including their extensive contacts and business activities in this District.

10. Venue is proper in this District because at all relevant times, Defendants resided, transacted business, were found, or had agents in this District, and because a substantial part of the events giving rise to Plaintiffs' claims occurred in this District. Defendants transact a substantial amount of business in the Northern District of Illinois, including the sale of Webkinz and the tied Ganz core products.

ALLEGATIONS COMMON TO ALL COUNTS

11. Webkinz are plush toy stuffed animals originally released by Ganz in April, 2005. Webkinz is both a toy and an online game. Unlike other stuffed toys typically on the market, Webkinz toys come with a special eight character code on their labels that allow a consumer (generally child consumers) to gain access to "Webkinz World" (www.webkinz.com), which is a website maintained by Ganz. Webkinz World allows the consumer to own a virtual version of the stuffed animal for virtual interaction.

12. When a consumer registers a Webkinz toy on the Ganz website, they “adopt” and name the pet in the virtual Webkinz World, which is an online play area with its own economy. The user receives “money” known as “KinzCash” by adopting new pets, playing online games, answering general knowledge questions, and through daily activities such as clicking “I love my Webkinz” buttons with their computer “mouse,” spinning the “Wheel of WOW,” or completing jobs available once every 8 hours. Each day, there is a “Game of the Day” that can be played by the user for bonus “KinzCash” and other bonuses that are periodically available.

13. In the Webkinz World, the user can actually create a virtual house for their Webkinz pets. Users can “spend” the KinzCash they acquire in the virtual world at the “W Shop” where they can buy food and clothing for their virtual pet and items for their pet’s rooms in the virtual house. Users can even use KinzCash to build additional rooms to their pet’s house or outdoor area.

14. After initially introducing Webkinz, Ganz sold Webkinz exclusively through its established retailers, mostly small “Mom and Pop” retailers and gift shops like THE CHESHIRE CAT and THE SPOTTED CROCODILE. Webkinz pets generally retail for between \$11.00 and \$15.00, depending on their popularity. The initial retail price was between \$7.95 and \$9.95.

15. In addition to Webkinz, Ganz also designs, produces, imports, and sells toys and other gift items, “collectibles,” “knick-knacks,” seasonal decorations, candles, costume jewelry, lip gloss, key chains, candle votives, martini glasses, and bottle stoppers. These products became referred to by Ganz as “core products.” The “core products” are not

necessary for the use of the Webkinz and, indeed, are unrelated to the Webkinz other than being distributed by GANZ, INC.

16. Prior to the first fiscal quarter of 2007, Ganz retailer-customers could order Webkinz from Ganz without being required to purchase the tied Ganz “core products.”

UNNANOUNCED OR DE FACTO TYING

17. Sometime prior to or during the first fiscal quarter of 2007, however, Ganz began to require existing retailer-customers to purchase the Ganz tied “core product” in order to be able to order Webkinz. The dollar amount of the order for the tied core product was usually a percentage (10% or more) of the desired order for the tying product, Webkinz. If the retailer-customer did not order any of the GANZ tied “core product” then he would not receive any Webkinz that he ordered.

18. Similarly, if a retailer like THE CHESHIRE CAT or THE SPOTTED CROCODILE did not have an existing account with Ganz, it was required to order a minimum amount of “core products” before becoming eligible to order Webkinz. (THE COMSTOCKS had to place an initial order of \$500 or \$1,000 of core products before being allowed to order Webkinz). After placing the minimum order for the tied Ganz products, the retailer could then submit an application to Ganz to order Webkinz. Approval was not guaranteed. Through this co-ordering requirement, a retailer’s ability to purchase the popular Webkinz product was conditioned on first purchasing a certain amount (minimum \$1,000.00 and in some instances more) of the tied (and unwanted) Ganz “core products.” Ganz did not permit the retailer to return any of the tied Ganz products that it does not sell. Thereafter, the requirement to buy core products was based on a percentage of the dollar amount of the desired Webkinz order.

19. As to THE COMSTOCKS, they set up an account with Ganz in order to become eligible to purchase Webkinz. A Ganz sales representative told THE COMSTOCKS that they needed to establish credit with Ganz, and suggested they send \$20,000.00 to avoid credit delays with shipping Webkinz. THE COMSTOCKS, wanting to be able to order the incredibly popular Webkinz, placed orders for core products, along with thousands of dollars of orders for Webkinz (See Ex. A attached). However, THE COMSTOCKS only received from GANZ the core product, much of which they didn't order. They did not receive Webkinz as part of these orders. Only after paying this initial \$20,000.00 requirement did THE COMSTOCKS receive Webkinz from Ganz.

ANNOUNCED TYING

20. In the second fiscal quarter of 2007, Ganz announced to many of its retailer-customers that to order any newly-announced Webkinz clothes, they would be required to attend a "trade-show" convention in Atlanta, Georgia, in July 2007. In response to Ganz's new demand, many retailer-customers, including THE COMSTOCKS, incurred significant travel costs to attend the Atlanta trade-show so that they could purchase and receive Webkinz clothes when they were released.

21. During the Atlanta trade-show, Ganz formally announced its new "Webkinz Loyalty Program" under which Ganz created three tiers of retailer-customer preferred status for shipment and distribution of Webkinz. Under the new Program, retailer-customers were identified as "Gold," "Silver" or "Bronze" based upon the amount of core product they order within a twelve month period. Worse yet, most previous orders did not count towards the program.

22. The Ganz Loyalty Program for Webkinz retailers gives priority shipping for ordering more than specified levels of the “core products” within a twelve month period. Also, the greater the dollar value of “core products” ordered, the greater the maximum number of Webkinz products a retailer is allowed to order.

23. By establishing the new “Loyalty Program” that specifically created a priority shipping schedule based on a retailer-customer’s preferred status, Ganz conditioned the sale of, and access to, Webkinz on the purchase of the tied core product. Thus, Ganz was exploiting its control over the sale of Webkinz to force retailer-customers, including THE COMSTOCKS, into purchasing its line of tied core products.

24. In order to continue to receive Webkinz products, many of Ganz’s retailer-customers ordered tied core products at the Atlanta trade show even though they did not want or need the tied core products, or would have purchased such products elsewhere on different terms.

25. Thereafter, Ganz shipped voluminous amounts of un-wanted core product, that were not even ordered, to THE COMSTOCKS, along with Webkinz products as ordered.

26. At all times material herein, Ganz knew, or reasonably should have known, that it could not and would not timely fill Webkinz orders within the priority shipping time frames as agreed to and promised by Ganz.¹

27. At all relevant times, Ganz possessed, and continues to possess sufficient power in the relevant product market to force THE COMSTOCKS and members of the Class into this tying arrangement. Ganz also possessed, and continues to possess, sufficient

¹ The “priority shipping time” is just that many of the Webkinz are season oriented such as for Halloween, Christmas, etc.

power in the relevant product market to appreciably restrain competition in the market in which the tied Ganz products compete.

28. Ganz's manipulation of delivery of Webkinz orders exerted further market power over its retailer-customers, including THE COMSTOCKS, because as part of its tying arrangement, retailer-customers could not return core product deliveries despite not having received Webkinz orders in a timely fashion. Thus, Ganz retailer-customers were irretrievably committed to the purchase of the tied core products.

29. THE COMSTOCKS and the members of the putative Class have suffered monetary injury due to Ganz's actions of forcing them to order the tied Ganz core product to gain access to Webkinz. Ganz's actions have also allowed it to reap and retain wrongful profits at the expense of its retailer-customers.

30. THE COMSTOCKS bring this action on behalf of all persons and entities in the United States who either were existing retailer-customers of Ganz or who established an account with Ganz and who ordered Webkinz from Ganz on the condition that they also order tied products from Ganz's line of "core products."

31. During the relevant time period, Ganz sold Webkinz and the tied Ganz products in interstate commerce. The violations of law asserted herein have occurred in interstate commerce, and Ganz was able to foreclose a substantial amount of interstate commerce in both the relevant market and the markets in which the tied Ganz products compete.

CLASS ALLEGATIONS

32. Plaintiffs bring this action on their own behalf and as a class action pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the following Class:

All existing retailer-customers of Ganz or retailers who established an account with Ganz in the United States from April 1, 2005 to the present that ordered Webkinz from Ganz on the condition that they also order products from Ganz's line of core-product.

33. While THE COMSTOCKS do not know the exact number of Class members, members of the purported Class number in at least the hundreds and are sufficiently numerous and geographically dispersed throughout the United States so that joinder of all Class members is impracticable.

34. There are questions of law and fact common to the Class. They include but are not limited to:

- a. The existence of separate and distinct tying products and tied products;
- b. The definition of the relevant product market for Webkinz;
- c. Whether Ganz implemented an unlawful and illegal tying arrangement that conditioned retailers' ability to purchase Webkinz on their purchase of a specified, minimum dollar amount of the tied Ganz products in the United States in violation of Section 1 of the Sherman Act;
- d. That Ganz had sufficient economic power in the relevant tying product market to appreciably coerce its retailer-customers to purchase its tied core products;
- e. Whether THE COMSTOCKS and other Class members were economically injured by reason of Ganz's unlawful and illegal conduct;
- f. The appropriate measure of damages sustained by THE COMSTOCKS and other Class members.

35. THE COMSTOCKS' claims are typical of the claims of the Class members and they will fairly and adequately protect the interests of the Class. THE COMSTOCKS purchased Webkinz from Ganz on the condition that they also purchase a specified minimum dollar amount of the tied Ganz core products, and their interests are coincident and not antagonistic to those of the other Class members.

36. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members.

37. A class action is superior to other methods for the fair and efficient adjudication of this controversy because the individual Class members are not all aware that they have been wronged and are thus unable to prosecute individual actions; concentration of the litigation concerning this matter in this Court is desirable; the claims of the THE COMSTOCKS are typical of the claims of the members of the purported class; a failure of justice will result from the absence of a class action; and, the purported class and the difficulties likely to be encountered in the management of this class action are not great.

38. Class treatment will also permit the adjudication of many relatively small claims by many Class members who otherwise could not afford to litigate an antitrust claim like the one asserted in this Complaint. This class action presents no difficulties in management that would preclude maintenance as a class action. Finally, the Class is readily definable and is one for which records of the names and addresses of Class members exist in Ganz's files.

39. THE COMSTOCKS will fairly and adequately protect the interests of all members of the putative Class in the prosecution of this action and in the administration of all matters relating to the claims stated herein. THE COMSTOCKS are similarly

situated with, and have suffered similar injuries as, the members of the putative class they seek to represent. THE COMSTOCKS have been wronged, wish to obtain redress of the wrong and want Ganz stopped from perpetrating its scheme and continuing to profit from its illegal tying arrangement involving its core product line. To that end, THE COMSTOCKS have retained counsel experienced in complex class action cases. Neither THE COMSTOCKS, nor their counsel, have any interest that may cause them to not vigorously pursue this action.

GANZ'S RELEVANT PRODUCT MARKET

40. According to the NPD Group, Inc. (a leading provider of consumer and retail industry information), in 2007 overall United States retail toy sales in all categories were estimated to be \$22.1 billion, and \$22.6 billion in 2006.

41. The U.S. retail toy industry consists of multiple categories including: action figures & accessories; arts & crafts; building sets; dolls; games/puzzles; infant & preschool; learning & exploration; outdoor sports toys; plush toys; vehicles; and, all other toys. These categories contain further subcategories. For example, the “dolls” category contains four subcategories including “Nurturing Dolls & Accessories,” “Fashion Themed Dolls/Figures & Accessories,” “Playset Themed Figurines & Accessories,” and “Display Dolls, Houses & Accessories.” These subcategories are further subcategorized leaving the “dolls” category with over 10 subcategories.

42. The “plush” toy category of the U.S. retail toy industry contains three subcategories: “Special Feature Plush,” “Traditional Plush,” and “Puppets.”

43. Further, according to the NPD Group, Inc., an emerging trend in the U.S. retail toy industry is the increase in sales of connected web play toys that marry a physical toy

with ongoing digital play opportunities via the Internet. This growth is due “in large part to the popular Webkinz brand.” (“U.S. Toy Industry Sales Generate \$22 Billion in 2007,” Thomson Reuters, Feb. 12, 2008).

44. GANZ’s Webkinz product line combines both a plush toy product with an online computer experience. Thus, the consumer who purchases a Webkinz stuffed animal has the option to play with the plush toy in the “real world,” while at the same time entering the online play area with its own economy, using the character code, and interact with his or her pet in the “virtual world.” The relevant product market definition in the United States for Webkinz is: the plush toy combined with an online gaming experience market.

45. A “virtual world” can be defined as a computer-based interactive simulated environment that can be accessed by multiple users through an online interface. Virtual worlds are sometimes also called “digital worlds,” “simulated worlds,” or “MMOGs.” While there may be different types of virtual worlds, they generally share six features in common: (a) shared space in which the world allows multiple users to participate at once; (b) graphical user interface in which the world depicts space to the user visually; (c) immediacy in which the interaction takes place in “real time”; (d) interactivity in which the world allows users to alter, develop, build or otherwise submit customized content; (e) persistence in which the world’s existence continues regardless of whether individual users are logged in; and (f) socialization/community in which the world allows or encourages interactions amongst users.

46. To state that a virtual world requires a “real world” toy to participate online would be incorrect since many, if not most, virtual world games do not require a toy for a user to join the world. Thus, defining the relevant product market for purposes of this action as

the virtual world market would be inaccurate and would result in an overly broad product market definition. Virtual worlds that do not require the purchase of a toy or other item for online access would not be reasonably interchangeable with plush toys combined with an online gaming experience.

47. The “real world” Webkinz product that a consumer purchases in the “real world” is a soft stuffed animal that comes with its own online code. Based on its physical characteristics, the Webkinz product can be categorized as a plush toy. By its very nature a Webkinz product would not be categorized as an “action figure,” a “doll,” an “outdoor sports toy,” or a “vehicle.”

48. Defining the relevant product market as plush toys combined with an online gaming experience produces a set of products that are reasonably interchangeable. While there might be only a small number of possibly interchangeable products, defining the relevant product market as such still results in a level of reasonable interchangeability. Examples of other plush toys combined with an online gaming experience might include “Shining Stars” by Russ Berrie & Co., which consist of over 20 different plush stuffed animal toys that come with a code to enter the “Shining Stars” virtual world, or “Mushabellys” by Jay at Play, a subsidiary of Jay Franco & Sons, Inc., which are plush toy animals and friendly-looking monsters that come with a code to unlock the “Mushabelly University” online world.

GANZ’S DOMINANCE IN THE RELEVANT MARKET

49. Webkinz is an extremely popular product in the United States. In 2007, Webkinz was rated as the “coolest” toy brand by girls aged six to eleven, and as the third coolest toy brand by boys of the same age. Girls also ranked Webkinz as the “coolest” brand

overall, beating out major players like Barbie, High School Musical, Hannah Montana, and Abercrombie & Fitch (See *Playthings*: “Toys Still Tops With Kids – Barely – Kids share coolest brands heading into the holidays” January 1, 2008, attached as Ex. B).

50. Webkinz sales have also been high. Although Ganz does not regularly release sales figures, Anita Frazier of the NPD Group estimated that Webkinz revenues in the U.S. topped \$45 million in 2006. Webkinz sales revenues for 2007 have been estimated at \$100 million (See Ex. C attached). The Webkinz world has been valued by one industry insider at \$2 billion (See Ex. D attached). Over 21% of retailers surveyed told Toy Directory Monthly that Webkinz was their best selling item in 2007 (See Ex. E attached).

51. By contrast, Webkinz’s chief competitor, Shining Stars, boasted just \$4 million in sales in the second quarter of 2007, right after its introduction, according to investors.

52. The Webkinz site is one of the most visited websites aimed at children and teens. In July 2007, the Webkinz site had over 5 million unique visitors – more than any other virtual world. As of July 2007, the Webkinz site had the most unique visitors among U.S. children ages 2 to 11 of any website. Webkinz’s site traffic increased by over 175% from January to July of 2007. In March of 2008, nearly 12 million unique visitors accessed the Webkinz site. Other than the Apple iPhone, Webkinz was the fastest-growing online search term in the United States.

53. The current competition for Webkinz consists chiefly of Russ Berrie & Co.’s Shining Stars and Hasbro’s Littlest Pet Shop VIPs.

54. Littlest Pet Shop VIPs were just introduced in early 2008, and are not yet a consistent revenue source.

55. Shining Stars boasts approximately 1 million registered users for its website (www.shiningstars.com); Webkinz consistently has 5-6x that many visitors to the Webkinz World (www.webkinz.com). Attached as Ex. F is a graph comparing online traffic to the Webkinz World and the Shining Stars website over the last year, a key indicator of success for a toy that combines real world play and online gaming. Webkinz traffic is consistently much higher, and for June 2008 had almost 7 million visitors to Shining Stars' approximately 125,000.

GANZ'S WRONGFUL CONDUCT AND ANTITRUST VIOLATIONS

56. Beginning in at least July 1, 2006, Ganz instituted a policy whereby persons or entities who did not have an account with Ganz and wanted to order Webkinz had to purchase approximately \$1,000 of the unwanted tied Ganz products.

57. In addition to the co-ordering requirement, Ganz has a Loyalty Program for Webkinz retailers that gives priority shipping for ordering more than specified levels of "core products" within a twelve month period. Also, the greater the dollar value of core products ordered, the greater the maximum number of Webkinz the retailer was allowed to order (See Ex. G attached).

58. Ganz forced retailers to order and purchase core products if they wanted to sell Webkinz, even if they did not want the tied core products.

59. Ganz's anti-competitive conduct is objectively baseless and motivated by a desire to restrict competition in the relevant market. Ganz's tying arrangement has had the effect of restricting competition in the relevant product market and the markets for the tied products.

60. Plaintiffs and the Class must order Webkinz directly from Ganz to ensure that they receive genuine Webkinz products.

61. Ganz adopted and implemented these co-ordering policies and practices to preserve and extend its dominant position in the relevant market. These policies and practices have made it more difficult for Plaintiffs and the Class to sell products that compete with Webkinz and/or the tied Ganz products. Plaintiffs and the Class are forced to stock limited retail shelf space with unwanted core products, limiting their ability to sell competing products. Ganz's unlawful and illegal conduct has had the effect of restricting competition in the relevant market and the markets for the tied Ganz products. Meanwhile, Ganz's conduct has allowed it to maintain and increase its market share in those markets.

62. By using its power in the relevant market to restrict competition in the markets for the tied products, Ganz artificially increased its revenues and profits from the tied Ganz products.

63. There is no legitimate reason for Ganz to require Plaintiffs and the Class to order the tied Ganz products to become eligible to sell Webkinz. Ganz's customers do not benefit from the arrangement. Ganz does benefit from increased profits and revenues from the tied Ganz products. The tying arrangement illegally restricts competition and violates federal antitrust laws.

**THE COMSTOCKS AND THE CLASS SUFFERED ANTITRUST INJURY DUE
TO GANZ'S CONDUCT**

64. Through their unlawful acts, Ganz acted to the detriment of Plaintiffs and Class members, resulting in Ganz reaping unlawful revenues and profits derived from the tied Ganz products.

65. Plaintiffs and the Class have been injured in their property and business as a direct and proximate result of Ganz's unlawful conduct. Plaintiff and the Class have suffered

monetary damages from being coerced into purchasing unwanted tied Ganz products as a condition of purchasing Webkinz. Ganz's practices have forced Plaintiffs and the Class to purchase and stock unwanted items that take up valuable retail shelf space. This shelf space could be used for products that compete against Webkinz and/or the tied Ganz products.

66. As to THE COMSTOCKS, approximately 40% of their limited shelf space is occupied with unwanted Ganz core products. This shelf space could be otherwise used for products that compete with Webkinz and/or the tied Ganz core products; products that actually sell.

VIOLATIONS ALLEGED

67. Plaintiffs incorporate by reference all the allegations set forth above as if fully set forth herein.

68. Through its co-ordering requirement, Ganz has conditioned the sale of Webkinz (the "tying product") to the order of the tied Ganz core products (the "tied product"). Ganz has sold Webkinz to THE COMSTOCKS and the Class on the condition that they also order the tied Ganz products.

69. The tying product (Webkinz) is separate from the tied product (the Ganz core products). Demand for the two products is separate; there is sufficient demand for each product separately that it is economically efficient to offer the two products separately.

70. Ganz has used its power in the relevant product market to force THE COMSTOCKS and members of the putative Class to purchase the tied Ganz products in order to sell Webkinz.

71. Ganz has sufficient economic power in the United States market for plush toys combined with online gaming to enable it to restrain trade appreciably in the markets where the tied Ganz products compete. Ganz's tying arrangement has been successful and affects a substantial volume of trade and commerce. Ganz has been able to force THE COMSTOCKS and Class members to order the tied products if they want to order Webkinz. Had Ganz not imposed the tying arrangement, THE COMSTOCKS and many Class members would not have ordered the tied Ganz products, or would have ordered a much smaller amount than Ganz forced them to order.

72. Ganz has a financial interest in the sale of the tied products so as to increase sales and its share in the markets where the tied Ganz products compete.

73. Ganz's tying arrangement has harmed competition and foreclosed a substantial amount of interstate commerce in the markets where the tied Ganz products compete.

74. Ganz's tying arrangement has caused monetary injury to Plaintiffs and the Class.

75. Ganz's tying arrangement is objectively baseless and subjectively motivated by a desire to restrict competition. The tying arrangement imposes excessive burdens, and any legitimate business purposes could be accomplished by less restrictive means.

76. The tying arrangement constitutes a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1), and Section 3 of the Clayton Act (15 U.S.C. § 14).

COUNT II - BREACH OF CONTRACT

THE COMSTOCKS repeat and reaver the allegations of paragraphs 1 through 76 as if realleged herein.

77. During the relevant Class period, THE COMSTOCKS, and the members of the putative Class that they seek to represent, entered into contractual agreements with Ganz in which they ordered both Ganz core products and Webkinz.

78. Under the terms of the agreements with the THE COMSTOCKS, and the members of the putative Class they seek to represent, Ganz agreed to deliver both the core-product and the Webkinz in a commercially timely manner.

79. During the relevant Class period, Ganz breached its contractual agreements with THE COMSTOCKS and the members of the Class they seek to represent, by: failing to deliver Webkinz orders in a commercially timely manner and by breaching the duty of good faith and fair dealing in accepting orders for both tied core products and Webkinz from retailer-customers while reasonably knowing that it would not be able to deliver orders of Webkinz in a commercially timely manner or deliver Webkinz orders at all.

80. As a direct and proximate result of Ganz's breach of contract, THE COMSTOCKS and the members of the Class they seek to represent have been damaged.

PRAYER FOR RELIEF

WHEREFORE, THE COMSTOCKS, on behalf of themselves and the Class, pray for relief as follows:

- a.** The Court declare and decree that Ganz's acts, conduct, and practices are unlawful under Section 1 of the Sherman Act (15 U.S.C. § 1), Section 3 of the Clayton Act (15 U.S.C. § 14), and constitute breach of contract;
- b.** The Court permanently enjoin Ganz, as well as its officers, agents, servants, employees, and attorneys who shall receive actual notice of the Court's injunction, from continued performance of those acts, forms of conduct and practices found to be illegal, as provided by Section 16 of the Clayton Act (15 U.S.C. § 26; *see also* 15 U.S.C. § 4);

- c. The Court award THE COMSTOCKS and the members of the Class threefold their actual antitrust damages sustained as a result of Ganz's antitrust violations, as provided by Section 4 of the Clayton Act (15 U.S.C. § 15);
- d. The Court award THE COMSTOCKS and the Class reasonable attorneys' fees and costs as provided by Section 4 of the Clayton Act (15 U.S.C. § 15) and the common fund doctrine;
- e. The Court award THE COMSTOCKS and members of the Class pre-judgment and post-judgment interest as permitted by the law;
- f. The Court award Plaintiffs and members of the Class such other and further relief at law or in equity as the Court may deem just and proper.

Respectfully submitted,

/s/ Arthur S. Gold
one of their counsel

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